RE TENGKU REZA SHAH TENGKU CHAIDZIR SHAH; EX P PANGLOBAL PROPERTIES SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
HUE SIEW KHENG JC
[BANKRUPTCY NO: 29-1500-2005]
31 JULY 2009

BANKRUPTCY: *Receiving and adjudication orders - Power of court to annul - Grounds for annulment - Notice of intention to oppose petition duly filed and served - Whether debtor's opposition to petition should be heard before hearing of creditor's petition and granting of receiving and adjudication orders - Substituted service of bankruptcy notice and creditor's petition, whether order obtained regularly - Whether Deputy Registrar correct in setting aside receiving and adjudication orders - Bankruptcy Act 1967, s. 105(1) - Bankruptcy Rules 1969, form 16, r. 117*

This was an appeal by the judgment creditor ('JC') to the judge-in-chambers against the decision of the Deputy Registrar setting aside the receiving and adjudication orders ('RO/AO') upon the application of the judgment debtor ('JD'). It was the JD's position that the JC had applied for substituted service of the bankruptcy notice ('BN') and creditor's petition ('CP') and had obtained the RO/AO without the JD's knowledge or that of his solicitors.

Before the judge-in-chambers herein, the JC contended that the RO/AO was wrongly set aside as the JD's application did not come within s. 105(1) Bankruptcy Act 1967. The JD, on the other hand, contended that the only issues that were pertinent were: (i) whether its notice of intention to oppose the BN/CP should have been heard *inter partes* and determined before the CP was heard *inter partes* and the RO/AO granted as the JD was represented by solicitors all along; and (ii) whether the JC's application for substituted service and the subsequent advertisement of the CP in the newspapers were proper considering that the JD was represented by solicitors at all material times and that the JC's solicitors were aware of this all along.

Held (dismissing the JC's appeal):

(1) The JD was clearly entitled to be heard at the hearing of the CP as he had filed a Form 16 notice of intention indicating his intention to oppose the CP and served it on all parties concerned. It was wrong to have denied the JD his right to be heard pursuant to r. 117 Bankruptcy Rules 1969. (paras 10 - 13)

(2) The JD's Form 16 notice of intention to oppose the BN/CP was filed on 13 July 2006. The JD's current address was stated in the said Form 16 notice. Despite this, the JC had purported to effect service at another address and, thereafter, filed an application for an order for substituted service on 10 December 2007. No attempt was made to effect service on the JD at the stated address or to serve the BN/CP through the JD's solicitors who were on record. Clearly, therefore, the order for substituted service was obtained irregularly. The deputy registrar was right to have set aside the RO/AO. (para 14)

Case(s) referred to:

Bungsar Hill Holdings Sdn Bhd v. Dr Amir Farid Datuk Isahak [2005] 2 CLJ 809 FC ***(refd)***

Dato' Sri Teong Teck Leng v. Jupiter Securities Sdn Bhd [2003] 4 CLJ 34 CA ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 105(1)
Bankruptcy Rules 1969, rr. 18, 95, 110, 117

For the judgment debtor - K Bimalarajah; T/n KB Rajah & Co
For the judgment creditor - Subramaniam; M/s NK Tan & Rahim
For the Department of Insolvency Malaysia - Azmi Mashood FC

Reported by Gan Peng Chiang

JUDGMENT

Hue Siew Kheng JC:

[1] On 19 January 2009 the learned deputy registrar set aside the receiving and adjudicating orders ("RO" and "AO") dated 11 November 2008 on the application of the judgment debtor *vide* encl. 22. The judgment creditor now appeals against the said decision.

Background Facts

[2] The facts of the case according to the respondent are as follows:

> The judgment debtor came to know that a bankruptcy notice was advertised in the "Sun" newspaper on 7 July 2006 and as a result he filed a notice by debtor of intention to oppose the bankruptcy notice, ie, encl. 9 and served the same on the judgment creditor's solicitors through his solicitors sometime in

July, 2006. It was also served on the insolvency department. He was, it (sic) to be noted, represented by his solicitors Messrs. KB Rajah & Co. His personal address was also stated in the said notice by debtor of intention to oppose the bankruptcy notice.

Nothing transpired after that until the judgment debtor received a letter dated 26 November 2008 from the insolvency department stating that receiving and adjudicating orders had been made by judgment creditor against him on 11 November 2008 and that he was to communicate with the officers of the said department. It was subsequently discovered that the judgment creditor had applied for substituted service of the petition and obtained the aforesaid orders without the knowledge of the judgment debtor and/or his solicitors who were at all material times on record.

Appellant's Contention

[3] The appellant contends that in an application to set aside the RO and AO, the judgment debtor has to bring himself within one of the three limbs of s. 105(1) of the Bankruptcy Act 1967.

Section 105(1) provides as follows:

> Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, or where it appears to the court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country, the court may annul the adjudication.

[4] Hence, the three instances where the court may annul the adjudication are:

i) when in the opinion of the court a debtor ought not to have been adjudged bankrupt;

ii) where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full; or

iii) where it appears to the court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that distribution ought to take place in that country.

It is obviously the first limb that is relevant in this case.

He Ought Not To Have Been Adjudged Bankrupt

[5] In respect of the first limb ie, that he ought not to have been adjudged bankrupt in the first place, it was submitted by the appellant that service of the Bankruptcy Notice (BN) and creditor's petition (CP) were effected on the debtor by way of substituted service. It was submitted that "or for any other cause" as provided in r. 110 of the Bankruptcy Rules 1969 rendered the substituted service effected good in law. It was also argued that if personal service is not possible for any reason, substituted service is as good as personal service. The case of *Bungsar Hill Holdings Sdn. Bhd. v Dr. Amir Farid Datuk Isahak* [2005] 2 CLJ 809 was cited in support.

[6] The appellant further submitted that since the BN was properly served on the debtor, it was incumbent upon the debtor to do one of two things ie, to comply with r. 95 of the Bankruptcy Rules 1969 which is to file an affidavit within the prescribed time limit or to apply under Rule 18 of the Bankruptcy Rules.

It was contended that the "Notis Oleh Siberhutang Mengenai Cadangan Hendak Membangkang Notis Kebankrapan" (encl. 9) which was filed did not comply with r. 95 or r. 18.

[7] Rule 18 is a general rule providing that applications to the court shall be made by summons-in-chambers supported by affidavit, except where otherwise provided.

Rule 95 provides as follows:

1) The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known.

2) If the application cannot be heard before the time specified in the notice for compliance with its requirements, the registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.

[8] It was further contended that even if the "notis" was an affidavit, it did not constitute a notice of intention to oppose the CP under r. 117 of the Bankruptcy Rules 1969 and therefore, the R.O. and A.O. were regularly obtained.

A **Respondent's Submission**

[9] It is the respondent's position that there are only two issues to be determined in this appeal and they are:

a) Whether encl. 9 should have been heard *inter partes* and
B determined before the petition was heard *inter partes* and receiving and adjudicating orders granted on 11 November 2008 as the judgment debtor had been represented by his solicitors from the initial bankruptcy notice stage; and

C b) Whether the application for the order of substituted service and the subsequent advertisement of the petition in the newspaper were good in the light of the fact that the judgment debtor was represented by solicitors at all material times and of which the judgment creditors solicitors were aware of from the very beginning of this bankruptcy proceedings.

D

[10] Upon perusal of the relevant cause papers and the submission filed herein, I am in agreement with the learned counsel for the respondent that the issues as raised by the respondent are material and pertinent in this appeal.

E

[11] The respondent has submitted that the "notis" filed by the respondent ie, encl. 9 has to be heard and disposed of before any petition is heard and subsequently R.O. and A.O. granted. Enclosure 9 is as earlier stated, entitled "Notis Oleh Siberhutang Mengenai Cadangan Hendak Membangkang Notis Kebankrapan". It
F is in form and substance similar to Form 16 as provided in the Bankruptcy Rules.

Rule 117 expressly provides that:

G > Where a debtor intends to show cause against a petition he shall file a notice with the Registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known a copy of the notice three days before the day on which the petition is to be heard

H The notice referred to in r. 117 is the Form 16 notice.

[12] It is not disputed that encl. 9 was filed on 13 July 2006 and served on all the parties.

In the case of *Dato' Sri Teong Teck Leng v. Jupiter Securities Sdn Bhd*
I [2003] 4 CLJ 34 the Court of Appeal held (at p. 42):

> In the instant case, a notice of intention to oppose the creditors petition pursuant to rule 117 was filed. That would be sufficient to

entitle the debtor to oppose the petition. He does not have to file further a summons-in-chambers for the purpose.

[13] The fact that the form 16 notice had been filed by the debtor indicating his intention to oppose the petition and served on all the parties clearly entitles him to a right to be heard at the hearing of the petition. This right was denied to the respondent.

[14] The second issue raised is with regard to the application for the order for substituted service (encl. 16) and the subsequent advertisement of the petition in "the Sun" newspaper. Enclosure 16 was filed on 10 December 2007. The Form 16 Notice, which was served on the appellant was filed on 13 July 2006.

In the form 16 notice the debtor had clearly stated his address to be No. 32, Jalan Sutera Jingga 8, Taman Sutera, 81200 Johor Bahru, Johor.

Despite the debtor's disclosure as to his current address, the respondent had purportedly attempted service at No. 48A, Jalan Sultanah Rogayah, Taman Iskandar, 80050 Johor Bahru, Johor. The order for substituted service was clearly irregularly obtained as the appellant had wilfully chosen not to serve the respondent at his stated address and in fact did not even attempt to do so. No attempt was also made to serve the BN and CP through the respondent's counsel although they were on record. They instead chose to rely on information obtained from the National Registration Department. The appellant has not disclosed any reason why it did not attempt to serve the respondent at his stated address. This clearly does not fall within the meaning of substituted service being as good as personal service as held in *Bungsar Hill (supra)*.

In view of the fact that the notice of intention to oppose was filed and served on all the relevant parties but the respondent was not heard because the CP was served on him by way of substituted service the R.O. and A.O. granted on 11 November 2008 were correctly set aside by the learned deputy registrar, particularly when the order for substituted service was irregularly obtained.

The appeal is hereby dismissed with costs.